A

SULISEN SDN BHD

v.

KERAJAAN MALAYSIA

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: D4-21-4-1995]
4 AUGUST 2006

C ***CONTRACT:*** *Claim for moneys owing - Goods supplied and delivered - Allegation of - Whether contract exists - Whether plaintiff appointed by defendant to supply goods - Whether there was a binding contract - Whether there was intention to create legal relations - Whether contract awarded to plaintiff - Privity - Doctrine of privity – Application of -*
D *Whether in favour of defendant*

CONTRACT: *Parties - Agreement - Goods supplied and delivered - Whether plaintiff a non party to the contract - Whether plaintiff could bring an action on the contract - Application of doctrine of privity -*
E *Whether in favour of defendant*

The defendant through the Ministry of Youth and Sports organised a programme, 'Program Pembangunan Rakan Rekreasi dan Rakan Cinta Alam' ('the said programme') and appointed Taman Pertanian Malaysia (exh. P1) to organize the said
F programme. The participants numbering 6,000 people were provided with food and drinks and other tenting equipment ('the goods'). The plaintiff (Sulisen Sdn Bhd) argued that they were the company appointed as the supplier for the said programme and that one Zanudin Abdul Aziz ('DW2') being the Timbalan
G Pengurus of Unit Taman Pertanian Malaysia, by signing the invoice as per exh. P2 and the delivery order as per exh. P3 had agreed to pay the plaintiff for the supply of those goods. The plaintiff also argued that they did not have any ties with Darikha Enterprise. The defendant, however, contended that there was not a single
H document to show that the plaintiff had ever been appointed to supply those goods for the said programme. That being the case, the defendant averred that the defendant did not owe the plaintiff the sum of RM279,150 as alluded to in the statement of claim. That by letter as per exh. D13 and also from the minutes of the
I meeting as per exh. D12, it was clearly shown that Darikha Enterprise was the company contracted to supply those goods. According to the defendant, all payments have been made to

Darikha Enterprise. The issues that arose: (1) whether the plaintiff was appointed by the defendant to supply goods to the said programme and whether that constituted a binding contract between them; (2) whether Darikha Enterprise was appointed to supply goods for the said programme and (3) whether the defendant owed the plaintiff the sum of RM279,150 for the goods sold and delivered to the defendant.

Held (dismissing plaintiff's claim):

(1) There was never any offer given to the plaintiff and there was also never any intention to create legal relations between the defendant and the plaintiff. There was no document to show that the plaintiff was awarded the contract by the defendant to supply the goods for the said programme. The plaintiff had failed to prove that the contract was ever awarded to the plaintiff. (para 22)

(2) Exhibits D11, D12 and D13 showed that Darikha Enterprise was the rightful contractual party with the defendant. The intention to create a contract was only intended for Darikha Enterprise. This court applied the doctrine of privity in favour of the defendant. A person who is not a party to a contract cannot take advantage of the provision of the contract. No one should be bound by the terms of a contract to which he was not a party to it and a non-party like the plaintiff could not bring an action on the contract. The plaintiff herein was a stranger to the contract between the defendant and Darikha Enterprise. (para 29)

(3) Since there was no contract in existence between the plaintiff and the defendant, the defendant therefore did not owe the plaintiff the sum prayed for. The defendant had fulfilled its obligation under the contract and had made the necessary payment to Darikha Enterprise, the rightful contractual party. (para 31)

Case(s) referred to:

Abbot v. Plumbe [1779] 1 Doug 216 ***(refd)***

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

Arunasalam v. Letchumi [1956] MLJ 89 ***(refd)***

Bart v. British West Indian Airways Ltd [1967] 1 Lloyd's Rep 239 ***(refd)***

Beswick v. Beswick [1968] AC 58 ***(refd)***

Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1995] 4 CLJ 45 HC ***(refd)***

Bowler v. Langworthy [1793] 5 TR 366 ***(refd)***
Brenan and Galen's case [1847] 10 QB 492 ***(refd)***
Bringloe v. Goodson [1839] 8 LJCP 364 ***(refd)***
Burns v. Edman [1970] 2 QB 541 ***(refd)***
Call v. Dunning [1803] 4 East 53 ***(refd)***
Cameron v. Young [1908] AC 176 ***(refd)***
Cavalier v. Pope [1906] AC 428 ***(refd)***
Chapman v. Kirke [1948] 2 KB 450 ***(refd)***
Cleaver v. Mutual Reserve Fund Life Association [1892] 1 QB 147 ***(refd)***
Davis & Sons v. Taff Vale Rly Co [1895] AC 542 ***(refd)***
Dennis v. White [1916] 2 KB 1 ***(refd)***
Dickson v. Reuter's Telegram Co [1877] 3 CPD 1 ***(refd)***
Doe v. Penfold 8C & P 536 ***(refd)***
DPP v. Hynde [1998] 1 All ER 649 ***(refd)***
Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd [1915] AC 847 ***(refd)***
Eckhardt Marine GMBH v. Sheriff, High Court of Malaya, Seremban & Ors [2001] 3 CLJ 864 CA ***(dist)***
Gibson v. Manchester City Council [1978] 2 All ER 583 ***(dist)***
Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***
Fisher v. Bell [1961] 1 QB 394 ***(refd)***
Fleming v. Bank of New Zealand [1900] AC 577 ***(refd)***
Foo Tock Lin v. Piong Kew [1963] 29 MLJ 67 ***(refd)***
Huth v. Huth [1915] 3 KB 32 ***(refd)***
Jackson v. Horizon Holidays Ltd [1975] 3 All ER 92 ***(refd)***
Johnson v. Mason [1764] 1 Esp 89 ***(refd)***
Keighley, Maxsted & Co v. Durant [1901] AC 240 ***(refd)***
KEP Mohamed Ali v. KEP Mohamed Ismail [1981] 2 MLJ 10 ***(refd)***
Kepong Prospecting Ltd v. Schmidt [1968] AC 810 ***(refd)***
Koshida Trading (S) Pte Ltd v. Limco Products Manufacturing Pte Ltd [1990] 2 MLJ 341 ***(refd)***
Morello Sdn Bhd v. Jacques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***
Mulpha Engineering Sdn Bhd v. Polycool Engineering & Trading Sdn Bhd & Ors [1994] 2 CLJ 634 HC ***(dist)***
Muniandy & Anor v. Muhammad Abdul Kader & Ors [1989] 2 MLJ 416 ***(refd)***
Nye v. Niblett [1918] 1 KB 23 ***(refd)***
Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124 ***(refd)***
Playford v. United Kingdom Telegraph Co [1869] LR 4 QB 706 ***(refd)***
Preston-Jones v. Preston-Jones [1951] AC 391 ***(refd)***
Price v. Easton [1833] 4 B & Ad 433 ***(refd)***
R v. Jones [1968] 54 Cr App R 63 ***(refd)***
R v. Luffe [1807] 8 East 193 ***(refd)***
R v. Ofori (No 2) [1993] 99 Cr App R 223 ***(refd)***
R v. Simpson [1983] 1 WLR 1494 ***(refd)***
R v. Yap Chuan Ching [1976] 63 Cr App R 7 ***(refd)***

Re Engelbach's Estate, Tibbetts v. Engelbach [1924] 2 Ch 348 ***(refd)***
Re Nesbitt [1844] 14 LJMC 30 ***(refd)***
Re Oxford Poor Rate Case [1857] 8 E & B 184 ***(refd)***
Re Peatling [1969] VR 214 ***(refd)***
Rederiaktiebolaget Argonaut v. Hani [1918] 2 KB 247 ***(refd)***
Rosita Baharom v. Sabedin Salleh [1993] 1 MLJ 393 ***(refd)***
Saxby v. Fulton [1909] 2 KB 208 ***(refd)***
Schmaling v. Tomlinson [1815] 6 Taunt 147 ***(refd)***
Scruttons Ltd v. Midland Silicones Ltd [1962] AC 446 ***(refd)***
Sri Kajang Rock Products Sdn Bhd v. Mayban Finance Bhd & Ors [1992] 1 CLJ 204; [1992] 3 CLJ (Rep) 611 HC ***(refd)***
Sri Minal Construction Sdn Bhd v. Mobil Oil Malaysia Sdn Bhd [2005] 4 CLJ 767 CA ***(refd)***
Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC ***(refd)***
Team 108 Technical Services v. Hujong Enterprises (Pte) Ltd [1987] 1 MLJ 272 ***(refd)***
The Chartered Bank v. Yong Chan [1974] 1 MLJ 157 ***(refd)***
Timothy v. Simpson [1834] 6 C & P 499 ***(refd)***
Tweddle v. Atkinson [1861] 1 B & S 393 ***(refd)***
Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan [1987] 1 MLJ 393 ***(refd)***
Wong See Leng v. C Saraswathy Ammal [1954] MLJ 141 ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***
Yzquierdo v. Clydebank Engineering and Shipbuilding Co [1902] AC 524 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 70
Rules of the High Court 1980, O. 16 rr. 1(1), 3(2)

For the plaintiff - Dir Kheizwan Kamarudin; M/s Manjit Singh Sachdev, Mohammad Radzi & Partners
For the defendant - Norliza Zulkifli SFC (Junariah Datu Derin FC with her)

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

Facts Of The Case

[1] The defendant through the Ministry of Youth and Sports organised a programme known as the "Program Pembangunan Rakan Rekreasi dan Rakan Cinta Alam" (hereinafter referred to as the "said programme") at Taman Pertanian Malaysia from 29

March 1995 till 1 April 1995. The defendant appointed Taman Pertanian Malaysia by letter dated 24 March 1995 as seen in exh. "P1" to organise the said programme. Throughout the four (4) days' programme, the participants numbering 6,000 people were provided with food and drinks and other tenting equipment. (hereinafter referred to as the "goods"). A company was contracted to supply those goods for the said programme.

The Plaintiff's Case

[2] The plaintiff (Sulisen Sdn Bhd) argued that they were the company which was appointed as the supplier for the said programme and that Encik Zanudin Abdul Aziz ("Zanudin") (DW2) being the Timbalan Pengurus of Unit Taman Pertanian Malaysia, by signing the invoice as per exh. "P2" and the delivery order as per exh. "P3" on the date of the delivery had agreed to pay the plaintiff for the supply of those goods. The plaintiff also argued that they did not have any ties with Darikha Enterprise.

The Defendant's Case

[3] In sharp contrast, the defendant argued that there was not a single document to show that the plaintiff had ever been appointed to supply those goods for the said programme. That being the case, the defendant averred that the defendant did not owe the plaintiff the sum of RM279,150 as alluded to in the statement of claim. That by letter dated 28 March 1995 as per exh. "D13" and also from the minutes of the meeting held on 12 March 1995 at 10am as per exh. "D12", it was clearly shown that Darikha Enterprise was the company contracted to supply those goods. And according to the defendant, all payments have been made to Darikha Enterprise.

Analysis Of The Evidence Adduced

[4] The said programme was a success. All the 6,000 participants were fed and taken care of. The plaintiff said that they should be paid for supplying the goods. But the defendant disputed that and said that the goods were supplied not by the plaintiff but rather by Darikha Enterprise. Two conflicting versions appeared. I must now examine the evidence adduced at the trial.

[5] The plaintiff through their representative by the name of Encik Mohd Nizam bin Ahmad Razali ("Nizam") (PW1) had discussions with Encik Mohd Rosli bin Mansur ("Rosli") (DW1), the Recreational Manager of Taman Pertanian Malaysia, and with

Zanudin (DW2), the Deputy Manager of Taman Pertanian Malaysia, pertaining to the supply of the goods for the said programme. The goods were packed at the plaintiff's office and was delivered to Taman Pertanian Malaysia by Encik Abdul Wahab bin Saaidin ("Wahab") (PW3), the lorry driver working with the plaintiff. The lorry driver gave evidence that the delivery was on behalf of the plaintiff. The goods were delivered on 28 March 1995 for the purpose of the said programme and Zanudin (DW2) signed the invoice in exh. "P2" and the delivery order in exh. "P3" and he too acknowledged the delivery of the goods. The invoice in exh. "P2" was worded in this way and it can be seen at p. 5 of the agreed bundle of documents:

SULISEN SDN. BHD

Ruj. Kami : Tarikh:
Ruj. Tuan :

Pengurus,

Taman Pertanian Malaysia,
Bukit Cahaya Seri Alam,
40000 Shah Alam,
Selangor Darul Ehsan.

Invoice

Pembekalan Makanan Dan Peralatan Rekreasi Bagi Program Rakan Muda Rekreasi Dan Rakan Cinta Alam Sempena Pelancaran Pada 28hb March 1995.

1. **Pakej Makanan:** RM10.00 * 4 hari * 6000 Peserta = RM240,000.00

2. **Pakej Kelengkapan Dapur:**

   a) Tungku zing : RM1.45 * 1500 unit = RM 2,175.00

   b) Lilin bahanapi : RM1.55 * 4500 kotak = RM 6,975.00

   c) Mess tin : RM10.00 * 3000 kotak = RM 30,000.00

   Jumlah Besar RM279,150.00

(Dalam Perkataan: Dua Ratus Tujuh Puluh Sembilan Ribu Satu Ratus Lima Puluh Ringgit Malaysia).

Urusan Pembayaran Hendaklah Dimajukan Kepada Sulisen Sdn. Bhd.

A

t.t.
...
(Penyerah)
Cop dan Tandatangan
Tarikh: 28.3.95

t.t.
...
ZANUDIN ABD. AZIZ
Timbalan Pengurus
Unit Taman Pertanian Malaysia
Kementerian Pertanian

B

No. 44A, Jalan Raja Bot, 50300 Kuala Lumpur. Tel: 2926782; 2927730 H/P: 010-2117390

C

Whereas the delivery order in exh. "P3" can be seen at p. 6 of the agreed bundle of documents and it was worded in this fashion:

D

SULISEN SDN. BHD.

Ruj. Kami : Tarikh:

Ruj. Tuan :

E

Pengurus,
Taman Pertanian Malaysia,
Bukit Cahaya Seri Alam,
40000 Shah Alam,
Selangor Darul Ehsan.

F

Delivery Order

Pembekalan Makanan Dan Peralatan Rekreasi Bagi Program Rakan Muda Rekreasi Dan Rakan Cinta Alam Sempena Pelancaran Pada 28hb March 1995.

G

1. **Pakej Makanan:** (4 hari * 6000 Peserta) = 6000 Peket

2. **Pakej Kelengkapan Dapur:**

   a) Tungku zing = 1500 Unit

H

   b) Lilin bahanapi = 4500 Kotak

   c) Mess tin = 4000 Set

I

t.t.	t.t.
...	...
(Penyerah)	ZANUDIN ABD. AZIZ
Cop dan Tandatangan	Timbalan Pengurus
Tarikh:	Unit Taman Pertanian Malaysia
	(Kementerian Pertanian)

No. 44A, Jalan Raja Bot, 50300 Kuala Lumpur. Tel: 2926782; 2927730 H/P: 010-2117390

[6] According to the plaintiff, the defendant failed to make the necessary payment for the goods sold and delivered. The plaintiff issued a demand letter dated 2 September 1995 in exh. "P4" and it can be seen at p. 7 to p. 9 of the agreed bundle of documents. Interestingly that demand letter demanded for the sum of RM120,000 and not RM279,150 and it was worded in this way:

SULISEN SDN BHD
No. 44, Jalan Raja Bot, 50300 Kuala Lumpur.
Tel: 03-2914181, 2914182, 2912648, 2913158 Fax 03-2937497

Your Ref: DATE:
Our Ref:

Tarikh: 2hb September, 1995.

Pengurus Besar,
Taman Pertanian Malaysia,
Bukit Cahaya Seri Alam,
4000 Shah Alam
Selangor Darul Ekhsan.

Tuan,

Per: Tuntutan Pembayaran Bagi Bekalan Barang Barang Makanan Kering/Tin Untuk Program Rakan Muda – Taman Pertanian Malaysia

Kami dengan segala hormatnya merujuk kepada perkara di atas.

1. Kami telah mengetahui akan rancangan di atas yang akan diadakan di Taman Pertanian Malaysia dari 28.03.95/30.03.95 melalui Encik Nizam Ahmad Razali dan En Kassim (Bahagian Bekalan, Kementerian Pertahanan Malaysia). Seterusnya perbincangan selanjutnya diadakan dengan Encik Rosli Mansor (Pegawai Bukit Cahaya) di Shah Alam dan beliau bersetuju dengan contoh barang yang dihantar sebelumnya oleh syarikat kami.

Keyakinan kami adalah dengan adanya surat kelulusan khas dari Ketua Setiausaha Kementerian Belia & Sukan, di mana setiap peserta yang dianggarkan berjumlah 6,000 orang peruntukan RM20.00 tiap peserta bagi makanan kering/tin untuk sessi itu. Jumlah semuanya ialah RM 120,000.00. Kami tidak dapat salinan surat di atas. Salinan Nota Hantaran dan Invois disertakan.

2. Di atas kelulusan surat serta pengesahan En Rosli Mansor, maka kami segera membuat persiapan pembungkusan kerana kesuntukan masa (dua hari) tanpa mendapat sebarang pesanan Rasmi Kerajaan. Encik Choo Kim Seng rakan kami turut saksi hadir sama kerana hal lain.

3. Seterusnya 6,000 bungkusan telah dihantar ke Taman Pertanian Malaysia dan disaksikan oleh En Rosli Mansor dan rakannya yang lain. Lori kami WCV 6472 dan pemandu Encik Abdul Wahab Sudin serta dua pembantu lain menurunkan barangan ini. Penghantaran adalah sebanyak dua kali (3 lori/3 tan) selama dua hari. Saya berada di tapak simpan kereta sehingga selesai diturunkan barang. Nota Hantaran/Invois diserahkan selepas selesai penerimaan. Disebabkan ramai peserta telah mula mendaftar masuk dan urusan lain yang perlu dijalankan segera pada masa itu, maka Nota Hantaran tidak ditandatangan dengan segera dan diserahkan kepada Encik Nizam Ahmad untuk menguruskan proses pembayaran.

4. Selepas itu kami telah beberapa kali membuat panggilan talipon dan diikuti oleh Encik Kassim telah berbincang dengan pegawai tuan berkenaan urusan pembayaran. Perakuan dibuat oleh Encik Zanuddin bahawa beliau telah menandatangan Invois/Nota Hantaran Syarikat Darliha, di mana Nota Hantaran/Invois sebenarnya adalah atas nama Syarikat Sulisen Sdn. Bhd.

5. Selepas lebih satu setengah bulan kemudian, Encik Kassim mendapati pembayaran telahpun dibuat kepada Encik Hassan/Encik Rahman dari Syarikat Darlikha yang berpejabat di Pertama Kompleks, Kuala Lumpur. Kami dinasihati oleh En. Zanuddin untuk mendapat pembayaran dari mereka.

6. Syarikat kami tidak ada sebarang hubungan dengan mereka di atas dan tidak mengenali atau pernah bertemu mereka. Kami percaya penyelewengan serta pakatan telah dibuat secara sulit bagi tujuan menipu kami. Kami cuba hubungi mereka di atas beberapa kali beberapa bulan. Bermacam cerita telah berbangkit dan seterusnya menghilangkan diri.

7. Dengan ini kami merayu agar dapat sekiranya pihak tuan mengambil tindakan yang sewajarnya bagi mendapat penyelesaian kes ini dan seterusnya pihak kami mendapat pembayaran ke atas barang yang dihantar kepada tempat tuan.

8. Kami telah bersabar sekian lama kerana mengharap pembayaran dari pihak yang tidak berkenaan yang telah menuntut pembayaran dari pihak tuan. Tetapi nyata sekali mereka tidak berniat membuat sebarang pembayaran.

9. Kami juga berharap agar dapat pihak tuan menyiasat puncanya berlaku perkara ini di jabatan berkenaan.

Yang benar,

t.t

s.k. 1. Ketua Setiausaha, Kementerian Belia & Sukan,
Kementerian Belia & Sukan,
Bt. Damansara, Kuala Lumpur.

2. Urusetia Rakan Muda.

3. Pengarah, Badan Pencegah Rasuah,
Wilayah Persekutuan, Kuala Lumpur.

4. Encik Nizam Ahmad Razali.

[7] The plaintiff later found out that the payment for the goods delivered for the sum of RM279,150 was paid to Darikha Enterprise. Yet, in this suit, the plaintiff did not cite Darikha Enterprise as a co-defendant. The plaintiff through Nizam (PW1) lodged a police report dated 11 September 1995 in exh. "P5" and this can be seen at p. 30 of the agreed bundle of documents:

BALAI POLIS **Sesyen 11 Syah Alam.**

Siapa yang ambil report **Sendiri.**

Waktu dan haribulan report **11.45 pagi 11/9/95.**

Nama **Mohd Nizam b. Ahmad Razali (A. 3065737).**

Lelaki atau perempuan **laki-laki** umur **20th.**

Keturunan **Melayu** bahasa **Melayu.**

Pekerjaan **berniaga.** Tempat tinggal **No 60/327.**
Batu 11 Gombak, 53100 Gombak Selangor pendakwa itu.

Aduan kata –

Pada 28/3/95 saya telah menghantar barangan pesanan ke Taman Pertanian Malaysia yang berupa makanan tin, messtin dan dapur. Penghantaran saya telah diterima oleh seorang pegawai yang bernama Encik Zanudin Aziz dan telah menurunkan tandatangan

selaku telah terima dengan cukup barangan yang dipesan. Hingga ke hari ini 11/9/95 setelah 6 bulan kami menanti pihak kami masih belum menerima sebarang bayaran dan apabila kami selidiki tahulah kami bahawa bayaran yang sepatutnya kami terima telah dibayar pada sebuah syarikat lain iaitu Dharika Ent yang beralamat di Lot 214 Campbell Complex. Penghantaran barangan kami juga telah disaksikan oleh seorang pegawai taman iaitu Encik Rosli Mansor dan beberapa orang urusetia Rakan Muda. Pihak kami telah kerugian sebanyak RM279,150 (Dua Ratus Tujuh Puluh Sembilan Ribu Satu Ratus Lima Puluh Ringgit).

t.t.

[8] Rosli (DW1) testified for the defendant and in his testimony he stated that the plaintiff had never been appointed to supply goods for the said programme. According to Rosli (DW1), the Ministry of Youth and Sports had issued a letter to Darikha Enterprise dated 28 March 1995 in exh. "D13" which can be seen at p. 41 of the agreed bundle of documents. In that letter (exh. "D13"), the Ministry of Youth and Sports had appointed Darikha Enterprise to supply those goods for the said programme and that a local order would be issued to them. That letter (exh. "D13") was worded in this way:

KEMENTERIAN BELIA DAN SUKAN, MALAYSIA,
(MINISTRY OF YOUTH AND SPORTS),
ARAS 6 & 7, BLOK K,
PUSAT BANDAR DAMANSARA,
50570 KUALA LUMPUR.

Telefon: 2552255
Kawat: BELIA
KUALA LUMPUR
Fax: 2556521

Ruj. Tuan:
Ruj. Kami: KBS.BS.03/03/35/(38)
Tarikh: 28 Mac 1995

Pengurus
Darikha Enterprise
Lot 2, 4 Campbell Complex
Jalan Dang Wangi
50100 Kuala Lumpur.

Tuan,

Pelancaran dan Perasmian Rakan Muda Rakan Rekreasi dan Cinta Alam

Adalah saya merujuk kepada perkara di atas, dengan ini diperakukan bahawa Kementerian Belia dan Sukan akan menanggung perbelanjaan tersebut di atas dan Taman Pertanian

Malaysia Bukit Cahaya Seri Alam akan membuat bayaran kos makan minum dan penginapan sebanyak RM20.00 sehari seorang (RM20.00 x 6000 x 4 hari) mulai 29 Mac hingga 2 April 1995 kepada pihak tuan bagi Program Kursus dan Pelancaran Program Rakan Rekreasi dan Rakan Cinta Alam.

2. Pesanan Kerajaan (LO) akan dikeluarkan oleh Taman Pertanian Malaysia kepada pihak tuan.

Sekian dan terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

t.t.
(RAJA RUSLAN BIN RAJA SAMAH)
Timbalan Ketua Pengarah Sukan
b.p. Ketua Setiausaha
Kementerian Belia dan Sukan
Malaysia.

[9] I am entitled to take judical notice that a local order would be issued to the party who enters into a contract with any Government department. It is a notorious fact that it requires no proof at all (*Re Peatling* [1969] VR 214 (Supreme Court of Victoria); *R v. Luffe* [1807] 8 East 193; *Preston-Jones v. Preston-Jones* [1951] AC 391, HL; *Burns v. Edman* [1970] 2 QB 541; *Re Oxford Poor Rate Case* [1857] 8 E & B 184; *Nye v. Niblett* [1918] 1 KB 23; *Dennis v. White* [1916] 2 KB 1; *Huth v. Huth* [1915] 3 KB 32, CA; *R v. Simpson* [1983] 1 WLR 1494, CA; *DPP v. Hynde* [1998] 1 All ER 649; *R v. Yap Chuan Ching* [1976] 63 Cr App R 7, CA; *Chapman v. Kirke* [1948] 2 KB 450 at 454; *R v. Jones* [1968] 54 Cr App R 63, CA; *Brenan and Galen*'s case [1847] 10 QB 492 at 498; *Re Nesbitt* [1844] 14 LJMC 30 at 33; *R v. Ofori (No: 2)* [1993] 99 Cr App R 223, CA; and *Saxby v. Fulton* [1909] 2 KB 208, CA). But, in the context of this case, the defendant's witnesses themselves testified that there was no local order issued for the said programme.

[10] Under cross-examination, Zanudin (DW2) again explained the significance of the local order and both he and Rosli (DW1) testified that the letter dated 25 March 1995 in exh. "D11" as well as the letter dated 28 March 1995 in exh. "D13" had been sent to Darikha Enterprise. Exhibit "D11" can be seen at p. 10 of the agreed bundle of documents and it was worded thus:

A Pengurus
Darikha Enterprise
Lot 2.14 Campbell Complex
Jalan Dang Wangi
50100 Kuala Lumpur

B Tuan,

Pelancaran dan Perasmian Rakan Muda Cinta Alam dan Rekreasi.

C Adalah saya dengan segala hormatnya menarik perhatian tuan kepada perkara yang tersebut di atas.

2. Pihak tuan adalah dengan ini dilantik untuk membekalkan khemah dan makanan secara pakej kepada enam ribu [6000] orang peserta bagi acara pelancaran dan perasmian program rakan muda cinta alam dan rekreasi selama empat hari mulai dari 29 D Mac 1995 hingga 2 April 1995 dengan kos sebanyak RM 20.00 sehari/orang. [RM 20.00 x 6000 x 4 hari = RM 480,000.00].

3. Bersama ini disertakan surat tanggungan dari Kementerian Belia dan Sukan Malaysia sebagai pengesahan kepada projek ini.

E 4. Pesanan Keranaan (L.O.) akan dikeluarkan oleh Taman Pertanian Malaysia kepada pihak tuan sedikit masa lagi.

Sekian, terima kasih.

F Saya yang menurut perintah,

t.t.
(ZANUDIN ABD. AZIZ)
Pengurus
Taman Pertanian Malaysia
G Bukit Cahaya Seri Alam
40000 Shah Alam.

Briefly, both exhs. "D11" and "D13" stated that Darikha Enterprise had been appointed to supply the goods for the said programme.

H

[11] Rosli (DW1) testified that both Nizam (PW1) and Encik Rahman bin Ismail ("Rahman") (another director of Darikha Enterprise) met him and Zanudin (DW2) a few times prior to the delivery of the goods. And that on all those occasions, Nizam I (PW1) had introduced himself to be from Darikha Enterprise. According to Rosli (DW1), never once did Nizam (PW1) ever mention that he was acting for the plaintiff. This version was also

confirmed by Zanudin (DW2). A

[12] The records from the Companies Commission of Malaysia in exh. "P8" showed that both Nizam (PW1) and Rahman were with Darikha Enterprise between 29 March 1995 to 1 April 1995. The records in exh. "P8" showed the following details: B

Maklumat Pemilik Masa Kini

1 Nama	:	Rahman bin Ismail
Alamat Kediaman	:	No. 141, Blk. C, Kampong Sungai Baru, Kuala Lumpur, 50300 W. Persekutuan.
Warna/Jenis	:	Biru
		Tarikh Lahir : 12/05/1955
		Tarikh Masuk : 20-06-1991
No K/P (Lama)	:	4807759
No K/P (Baru)		–
		Bangsa : Melayu
		Jawatan : Pengurus
		Jantina : Lelaki
		Kewarganegaraan : Malaysia

C D E

Maklumat Pemilik Dahulu

1 Nama	:	Mohd Nizam B. Ahmad Razali
Alamat Kediaman	:	No. 60/327, Batu 11, Gombak, Gombak Utara, Kuala Lumpur, 53100 W. Persekutuan.
Warna/Jenis	:	Biru
	:	Tarikh Lahir: 01/01/1975
	:	Tarikh Masuk: 06/04/1995
	:	Tarikh Keluar: 04/05/1995
No K/P (Lama)	:	A 3065737
No K/P (Baru)	:	–
	:	Bangsa: Melayu
	:	Jawatan: Tarik Diri
	:	Sebab Keluar: Tarik Diri
	:	Jantina: Lelaki
	:	Kewarganegaraan: Malaysia.

F G H

No wonder Zanudin (DW2) testified that Nizam (PW1) was from Darikha Enterprise when Nizam (PW1) and Rahman came to see him. This was what Zainudin (DW2) testified under cross-examination (see p. 84 of the notes of evidence): I

A S: Apakah tujuan Rahman dan Mohd Nizam yang datang jumpa kamu?

J: Bagi membekalkan barangan makanan untuk project rakan muda. Ada sample barang yang dihantar kepada saya. Sekali sahaja.

B

Nizam adalah daripada Darikha sebab dia datang bersama Rahman.

Even under re-examination, Zanudin (DW2) testified that Darikha Enterprise was appointed as the supplier for the said programme. C This was what Zanudin (DW2) testified at p. 89 of the notes of evidence:

S: Boleh awak beritahu Mahkamah, apakah nama syarikat yang dilantik sebagai pembekal bagi program rakan muda tersebut D oleh Encik Rosli (DW1)?

J: Darikha Enterprise.

Zanudin's (DW2's) mind was already attuned to the fact that the supplier for the said programme was Darikha Enterprise and that E Nizam (PW1) was from Darikha Enterprise and that was why he thought that the invoice in exh. "P2" and the delivery order in exh. "P3" were from Darikha Enterprise when he signed them. That was Zanudin's (DW2's) mental mechanism. Under re-examination at p. 91 of the notes of evidence, Zanudin (DW2) F explained it in this way:

S: Boleh terangkan kepada Mahkamah P2 – page 5 of bundle 'A' dan P3 – page 6 of bundle 'A' – kenapa awak tandatangan P2 & P3?

G J: Saya benar-benar menjangka bahawa apa yang saya tandatangan adalah daripada Syarikat Darikha Enterprise lebih-lebih lagi disampaikan kepada saya oleh Encik Nizam.

[13] Rosli (DW1) testified that he had called Darikha Enterprise H (after obtaining the telephone number from a newspaper) and asked whether they could supply the goods (food and tenting equipment). Rosli (DW1) then asked the people from Darikha Enterprise to come to Taman Pertanian Malaysia on the next day in order to discuss the matter further. On the next day, Nizam I (PW1) and Rahman from Darikha Enterprise turned up and the discussions between the parties in regard to the supply of the goods for the said programme went on smoothly. Even the main committee for the said programme was informed that Darikha

Enterprise was appointed to be the supplier. This very fact was minuted in the minutes of the meeting held on 12 March 1995 at 10am as reflected in exh. "D12" and it was worded as follows (see p. 22 of the agreed bundle of documents):

> Timbalan Pengurus Taman Rekreasi (En Zanudin b. Abd. Aziz) memaklumkan telah memilih Syarikat Darikha Enterprise sebagai pembekal makanan kering pada 29.3.95 hingga 1.4.95.

Zanudin (DW2) himself had testified that he was given the task of choosing the supplier of the goods for the said programme.

[14] The plaintiff placed a great deal of emphasis on the invoice in exh. "P2" and the delivery order in exh. "P3" that were signed by Zanudin (DW2) and argued that those documents constituted a legally binding contract between the plaintiff and the defendant. The defendant argued otherwise and submitted that Zanudin (DW2) had mistakenly signed those documents (exhs. "P2" and "P3") because he consciously thought that they were from Darikha Enterprise notwithstanding that the plaintiff's letterheads were printed in big fonts. Now, in considering exhs. "P2" and "P3", reference must be made to the records from the Companies Commission of Malaysia in exh. "P8" which showed that Nizam (PW1) was one of the directors of Darikha Enterprise. In contesting exh. "P8", Nizam (PW1) lodged a police report on 6 February 2004 at 12.42pm as seen in exh. "P7" and that police report was worded in this fashion:

> Pengadu Menyatakan:
>
> Pada 20/1/2004 jam lebih kurang 1200 hrs saya telah di maklumkan oleh peguamcara saya dari Tetuan Manjit Singh Sachdev Mohammad Radzi & Partners yang beralamat di No: 1 Tingkat 11, Wisma Havela Thakardas Jalan Tiong Nam Off Jalan Raja Laut 50350 Kuala Lumpur bahawa melalui satu carian syarikat Suruhanjaya Syarikat Malaysia, saya pernah menjadi pemilik satu syarikat yang dikenali sebagai Darikha Enterprise yang beralamat di Lot 2.14, Campbell Complex, Jalan Dang Wangi, 50100 Kuala Lumpur, Wilayah Persekutuan. Sedangkan saya tidak pernah menjadi pemilik syarikat Darikha Enterprise dan dengan ini memohon pihak polis untuk menyiasat mengenai perkara ini kerana saya percaya ini melibatkan penipuan. Inilah laporan saya.

That police report sought the assistance of the police to investigate as to why Nizam's name was listed in exh. "P8". The defendant submitted that Nizam (PW1) had only recently lodged

A that police report because he knew that the records from the Companies Commission of Malaysia in exh. "P8" would be used against him in the course of the trial. According to the defendant, it was impossible that Nizam (PW1) did not know about his involvement in Darikha Enterprise.

B

[15] I was asked by the defendant to take cognizance of how dubious it was for Encik Abdul Aziz bin Yahaya ("Aziz") (PW2) who had only known Nizam (PW1) a few months before the said programme but had allowed Nizam (PW1) to act as the plaintiff's C representative in securing a contract worth thousands of ringgit. The defendant submitted that Darikha Enterprise had sub-contracted the supply of the goods to the plaintiff and had failed to pay them. Flowing from this, it was emphasised by the defendant that there was no privity of contract between the D plaintiff and the defendant and, consequently, the defendant should not be made a party to this suit. Indeed the principle that only a party to a contract can enforce rights or have duties enforced against him under that contract is all too well known (*Price v. Easton* [1833] 4 B & Ad 433). It is said that a party to E a contract is one to whom a promise is made and who, in exchange for the promise, gives consideration for it. It is quite easy to understand as to why someone who is not a party to a contract should not have burdens imposed upon him. Lord Haldane LC in *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co.* F *Ltd* [1915] AC 847, PC at p. 853 affirmed the doctrine of privity in this way:

> My lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum* G *tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to H enforce it consideration must have been given to him to the promisor or to some other person at the promisor's request.

It is quite apparent that Lord Haldane LC in *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd (supra)* treated the privity doctrine and the rule that consideration must move from the I promisee as two separate principles. Lord Denning MR in *Jackson v. Horizon Holidays Ltd* [1975] 3 All ER 92, CA aptly said:

> At present the law says that the only one who can sue is the one who made the contract. None of the rest of the party can sue, even though the contract was made for their benefit.

Here, the plaintiff claimed that the organising of the said programme was done in a hurried manner. It was done in a rush and even if that was so there was, unfortunately, no document to show that the plaintiff was ever awarded the contract to supply those goods. Of significance would be this. That the plaintiff had failed to prove that such a contract existed between the plaintiff and the defendant. I was asked, time and again, to look at the whole case in its correct perspective and to hold that the invoice in exh. "P2" and the delivery order in exh. "P3" cannot give rise to a binding contract between the parties. There was nothing to suggest that the plaintiff was awarded the contract by the defendant and that exhs. "D11", "D12" and "D13" clearly showed that Darikha Enterprise was the rightful contractual party with the defendant. Nobody except a party to a contract can acquire rights under it. The doctrine of privity has been accepted by the courts since time immemorial (*Schmaling v. Tomlinson* [1815] 6 Taunt 147; *Tweddle v. Atkinson* [1861] 1 B & S 393; *Playford v. United Kingdom Telegraph Co* [1869] LR 4 QB 706; *Dickson v. Reuter's Telegram Co* [1877] 3 CPD 1, CA; *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 152, CA; *Fleming v. Bank of New Zealand* [1900) AC 577, PC; *Keighley, Maxsted & Co v. Durant* [1901] AC 240, HL; *Cavalier v. Pope* [1906] AC 428, HL; *Cameron v. Young* [1908] AC 176, HL; *Rederiaktiebolaget Argonaut v. Hani* [1918] 2 KB 247; *Re Engelbach's Estate, Tibbetts v. Engelbach* [1924] 2 Ch 348; *Scruttons Ltd v. Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1; *Beswick v. Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL; *Bart v. British West Indian Airways Ltd* [1967] 1 Lloyd's Rep 239 (Guyana CA); *Kepong Prospecting Ltd v. Schmidt* [1968] AC 810, PC; *Yzquierdo v. Clydebank Engineering and Shipbuilding Co* [1902] AC 524, HL; and *Davis & Sons v. Taff Vale Rly Co* [1895] AC 542, HL) and it will continue to be accepted by the courts for many more years to come.

[16] The defendant submitted that Nizam (PW1) had refused to personally proceed to see the officials at the Ministry of Youth and Sports because he knew that the plaintiff was not the contracting party and he also knew that payment had been duly made to Darikha Enterprise. The fact of the matter was this. That Nizam (PW1) had received exh. "P1" and succeeded in convincing

Aziz (PW2) to supply the goods for the said programme. It would be appropriate, at this juncture, to reproduce exh. "P1" and I shall do so now:

Kementerian Belia Dan Sukan, Malaysia
(Ministry Of Youth And Sports)
Aras 6 & 7, Blok K
Pusat Bandar Damansara
50570 Kuala Lumpur

Ruj. Tuan:
Ruj. Kami: KBS.B5.03/03/35/(36)
Tarikh: 24 Mac 1995

Pengurus
Taman Pertanian Malaysia
Bukit Cahaya
Shah Alam
Selangor Darul Ehsan

Tuan,

Peruntukan Program Rakan Rekreasi dan Rakan Cinta Sempena Majlis Pelancaran

Adalah dengan hormatnya saya memaklumkan mengenai perkara di atas, sepertimana yang tuan sedia maklum bahawa Kementerian Belia dan Sukan dengan kerjasama Kerajaan Negeri Selangor dan Kementerian Pertanian Malaysia akan menganjurkan Program Pembangunan Rakan Rekreasi dan Rakan Cinta Alam termasuk Majlis Pelancaran mulai pada 28 Mac hingga 2 April 1995.

2. Mengikut keputusan Mesyuarat Jawatankuasa Induk Majlis Pelancaran dan Program Pembangunan Program Rakan Rekreasi dan Rakan Cinta Alam, Kementerian Belia dan Sukan telah bersetuju untuk pihak Taman Pertanian membantu Kementerian menganjurkan beberapa persiapan sempena dengan kursus dan majlis pelancaran tersebut. Dengan ini, sukacita memaklumkan Kementerian bersetuju untuk pihak tuan menguruskan perkara-perkara berikut:

(i) menyediakan tempat penginapan dan makan minum untuk 6,000 orang peserta selama 4 hari dengan kadar RM28.00 sehari bagi setiap peserta;

(ii) menyediakan bilik mandi untuk 6,000 orang peserta selama 4 hari tidak melebihi kos perbelanjaan sebanyak RM20,000.00;

(iii) menyediakan tempat tandas untuk 6,000 orang peserta selama 4 hari tidak melebihi kos perbelanjaan RM20,000.00.

2. Waran peruntukan mengenai perkara-perkara yang tersebut di atas akan dihantar kepada pihak tuan dalam sedikit masa lagi.

Kerjasama dan tindakan pihak tuan bagi menjayakan Program Rakan Rekreasi dan Rakan Cinta Alam serta Majlis Pelancaran ini sangatlah dihargai dan diucapkan berbanyak terima kasih.

'Berkhidmat Untuk Negara'

Saya yang menurut perintah,

t.t.

(Zainal Abidin bin Abu Zarin)
Ketua Pengarah Sukan
b.p. Ketua Setiausaha
Kementerian Belia dan Sukan
Malaysia.

Exhibit "P1" was a crucial piece of document. It came from the Ministry of Youth and Sports and it spoke of the said programme and the budget that was allotted to it. In the plaintiff's letter in exh. "P4" which was reproduced earlier, the plaintiff alluded to the fact that it had not received the "surat kelulusan khas dari Ketua Setiausaha Kementerian Belia & Sukan" and this admission was quite obvious because the Ministry of Youth and Sports had never made any offer to the plaintiff. It must be borne in mind that all the goods which were received were in accordance to what was ordered, nothing less and nothing more. It was in the nature of one consignment only, so to speak. If Darikha Enterprise and Sulisen Sdn Bhd sent their goods simultaneously there would then be two consignments. Here, that never happened. Only one consignment was sent. Everything went according to plan. The contracting party that supplied the goods had rightly done its part of the bargain. And the supplier of the goods was none other than Darikha Enterprise. The plaintiff – Sulisen Sdn Bhd, was not a party to the contract and thus was not involved in the said programme. Two cheques were issued in favour of Darikha Enterprise. One was in the sum of RM200,000 and it was marked as exh. "D14 (a)", while the other was in the sum of RM13,760 as seen in exh. "D14 (b)". These two cheques showed that the defendant had paid Darikha Enterprise for the supply of the goods. It also showed that the defendant would not issue any cheque to any party easily unless there were supporting documents to support such payment.

[17] Pure and simple, in its statement of claim, the plaintiff sought for the sum of RM279,150 for the goods sold and delivered by the plaintiff to Taman Pertanian Malaysia under the said programme. The relevant letters of demand were issued but it was to no avail. At para. 7 of the statement of claim, the plaintiff prayed that judgment be entered against the defendant for:

(a) the sum of RM279,150;

(b) interest at the rate of 8% per annum on the sum of RM279,150 from the date of the filing of the claim until the date of full realisation;

(c) costs of this action; and

(d) such further relief as this Honourable Court deems fit.

[18] In its statement of defence, the defendant placed the plaintiff to strict proof thereof. The defendant too averred that the plaintiff was never appointed to supply the goods for the defendant or that any order was placed from the plaintiff for those goods. The defendant also averred categorically that no contract had been entered between the defendant and the plaintiff. The defendant further averred that it had appointed a company by the name of Darikha Enterprise to supply the goods for the said programme and that all transactions including the delivery of the goods and payment thereof had been made to Darikha Enterprise. The defendant admitted receiving the letter of demand dated 29 December 1995 but averred that the plaintiff's claim was wrongful and baseless. The defendant further averred that the plaintiff was not entitled to any damages, interest, costs or other reliefs based on the facts of the case. The defendant also denied each and every allegation as contained in the statement of claim as if the same were traversed. Finally, the defendant prayed that the plaintiff's claim be dismissed with costs.

[19] The parties are certainly bound by their pleadings (*Wong See Leng v. C Saraswathy Ammal* [1954] MLJ 141 at 142; *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; *Muniandy & Anor v. Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 at 418; *Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan* [1987] 1 MLJ 393; *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476; *The Chartered Bank v. Yong Chan* [1974] 1

MLJ 157; *Rosita bte Baharom (an infant) v. Sabedin bin Salleh* [1993] 1 MLJ 393; *KEP Mohamed Ali v. KEP Mohamed Ismail* [1981] 2 MLJ 10; *Morello Sdn Bhd v. Jacques (International) Sdn Bhd* [1995] 2 CLJ 23; and *Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551) and the trial of this suit is confined entirely to the pleadings. This was a case where the plaintiff alleged that they had supplied the goods for the said programme and claimed for payment together with interest and costs and any other relief which this court may deem fit. The defendant, on the other hand, contested the plaintiff's claim and alleged that there was no contract between the plaintiff and the defendant and that Darikha Enterprise was the contractual party with the defendant and it was Darikha Enterprise who had supplied those goods to the said programme. The defendant had also alleged that payment had since been made to Darikha Enterprise. The defendant also denied that the plaintiff was entitled to any damages, interest, costs or other reliefs.

[20] I must emphasise that there was no third party notice in this case and I should not consider it in this judgment, at all. The defendant was not obliged to issue a third party notice. The law stipulates that in any action begun by originating summons or by writ (see O. 16 r. 3(2) of the Rules of the High Court 1980 ("RHC")) where the defendant has entered an appearance (see O. 16 r. 1(1) of the RHC), the defendant may issue an appropriate third party notice in the prescribed form (see Form 22 of the RHC involving a claim for contribution, indemnity or other relief or remedy) against a person who is not already a party to the action.

[21] It would be appropriate, at this juncture, to examine the following issues:

(a) Whether the plaintiff was appointed by the defendant to supply goods to the said programme and whether that constituted a binding contract between them?

(b) Whether Darikha Enterprise was appointed to supply goods for the said programme?

(c) Whether the defendant owed the plaintiff the sum of RM279,150 for the goods sold and delivered to the defendant?

I will now examine these issues, one after another.

A **The First Issue**

[22] The plaintiff argued that the invoice ("P2") and the delivery order ("P3") constituted a binding contract between the plaintiff and the defendant. But the defendant argued to the contrary and B submitted that there was no offer at all being made by the defendant to the plaintiff. It was the defendant's stand that there was no binding contract between the plaintiff and the defendant. Both Rosli (DW1) and Zanuddin (DW2) testified that no contract was ever awarded to the plaintiff for the supply of the goods for C the said programme. And that from exh. "D12", the whole committee was informed that the contract was awarded to Darikha Enterprise. There was never any offer given to the plaintiff and there was also never any intention to create legal relations between the defendant and the plaintiff. The plaintiff has failed to D prove that the contract was ever awarded to the plaintiff. There was no document to show that the plaintiff was awarded the contract by the defendant to supply the goods for the said programme. In *Sri Kajang Rock Products Sdn. Bhd. v. Mayban Finance Bhd. & Ors.* [1992] 1 CLJ 204; [1992] 3 CLJ (Rep) 611, E VC George J (as he then was) aptly explained the meaning of the word "contract" of the report in these words:

> To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement, that is there must be a *consensus ad idem*; those parties must intend to create F legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration.

Obviously, the purported contract as claimed by the plaintiff lacked G the following elements:

(a) "to constitute a valid contract there must be a separate and definite parties" (here the definite party namely Darikha Enterprise had been appointed);

H (b) "those parties must be in agreement in that there must be *consensus ad idem*" (here there was no *consensus ad idem* between the plaintiff and the defendant);

(c) "those parties must intend to create legal relations in the I sense that the promises of each side are to be enforceable simply because they are contractual promises" (here both exhs. "D11" and "D13" were issued to Darikha Enterprise and not to the plaintiff); and

(d) "the promises of each party must be supported by consideration" (here the goods had been delivered by Nizam (PW1) from Darikha Enterprise on the date as promised and payment had been made to Darikha Enterprise, the lawful contracted party).

The plaintiff relied on the case of *Sri Minal Construction Sdn Bhd v. Mobil Oil Malaysia Sdn Bhd* [2005] 4 CLJ 767, CA, and placed emphasis on the passage that appeared in the judgment at p. 785 thereto and that passage was worded as follows:

> On the contrary, said the plaintiffs, the delivery orders were signed acknowledging delivery as ordered, and the invoices were not questioned. The plaintiffs exhibited the delivery orders and the invoices relating to the supplies on those two days.

But the defendant argued that in the context of this case, the invoice in exh. "P2" and the delivery order in exh. "P3" did not constitute a binding contract between the plaintiff and the defendant. The defendant then drew my attention to the case of *Koshida Trading (S) Pte Ltd v. Limco Products Manufacturing Pte Ltd* [1990] 2 MLJ 341, a decision of the High Court of Singapore by Chan Sek Keong J (now Chief Justice of Singapore) and the headnotes read as follows:

> (3) There was no invitation to the plaintiffs to accept the order but merely to acknowledge it in the manner described. The form did not say or purport to say that the acknowledgment would constitute a binding contract. There was nothing in the form which suggested to a reasonable supplier that acknowledging the order would bind him to supply the goods on the terms stated therein.

And the defendant augmented its case by stating that Zanudin (DW2) had selected Darikha Enterprise as the supplier of the goods to the said programme. By way of a rebuttal, it was argued by the plaintiff that the goods were delivered by Wahab (PW3) – the lorry driver, on behalf of the plaintiff and that the goods were packed by the plaintiff. To this, the learned senior federal counsel rightly submitted along the following lines. That anyone can pack or deliver the goods for Darikha Entrprise. To the defendant, the packers and the deliverers of the goods were immaterial. What was material was this. That there was a contract in existence between the defendant and Darikha Enterprise. It was submitted that Darikha Enterprise might have sub-contracted to the plaintiff to supply the goods for the said programme. But according to the

A defendant, such sub-contracting was of no concern to the defendant. The stand of the defendant was rather simple. That no contract for the supply of the goods was ever contracted to the plaintiff by the defendant. It was the stand of the plaintiff that in order to constitute a contract between the parties there was no B requirement that the contract must be made in writing or in the presence of witnesses to witness the making of the said contract. A simple contract requires little formality. A contract may be written; it may be partly written and partly oral; it may be wholly oral and may even be implied from the actions of the parties. The C essentials of any contract are the rights, duties and liabilities that arise from the promise or promises made by the parties. The law of contract is concerned with the mechanics involved in and the principles regulating the formation, performance, continuance and discharge of the parties individually created obligations. The D essential elements of any contract are:

(i) offer;

(ii) acceptance;

E (iii) consideration (not required for contracts underseal);

(iv) intention to be bound;

(v) mutuality;

F (vi) capacity; and

(vii) legality.

The offer and acceptance when taken together would form the G "agreement" and that agreement must be supported by consideration in order to establish the obligation. It is the parties that must intend that the agreement to have legal force and the courts will only enforce what the parties intend should be enforced. The parties too must agree on the same thing and this H would be known as mutuality. The parties too must have the capacity of reaching a binding agreement and the subject matter of the agreement must be legal. Briefly, these are the seven essential elements that must be present before a contract is said to be in existence. There are always some commercial flavour to a I contract. Of significance would be this. Behind all forms of contract, there is the basic idea of assent. A contracting party is bound to the contract because he has agreed to be bound by it. The parties are to be judged not by what they have in their minds

but by what they have said or written or done. Time and again, the plaintiff asked this court to scrutinise the invoice in "P2" and the delivery order in "P3", and the plaintiff emphasised that both these two exhibits were addressed to the Pengurus of the said programme for the supply of the goods for 6,000 participants and that both these two exhibits were acknowledged and signed by Zanudin (DW2) as the Timbalan Pengurus of Unit Taman Pertanian Malaysia. My attention was drawn to the evidence of Rosli (DW1) who testified for the defendant and, under cross-examination, Rosli (DW1) said that the delivery was made by the plaintiff. Reliance was placed by the plaintiff on the case of *Pernas Trading Sdn. Bhd. v. Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124, a decision of the Federal Court. That was a case where the appellants sued the respondents for the balance of the price of goods sold and delivered to the respondents. In their defence, the respondents denied liability and sought to show that the goods were ordered for a third party. The appellants applied for leave to sign final judgment but their application was dismissed by the senior assistant registrar and on appeal against the registrar's decision, the learned judge dismissed the appellant's appeal. The appellants then appealed to the Federal Court and the Federal Court allowed the appeal. The Federal Court held that it was quite clear from the sales invoice and the delivery note that the goods were ordered by the respondents. The Federal Court arrived at the decision because the respondents there did not deny that the goods were ordered by them and delivered to them. But here before me, the defendant's stand was this. That the invoice ("P2") and the delivery order ("P3") cannot solely be relied upon in order to determine the existence of a binding contract. The defendant also denied that there was any order or offer made to the plaintiff namely Sulisen Sdn Bhd.

[23] The plaintiff in *Mulpha Engineering Sdn. Bhd v. Polycool Engineering & Trading Sdn. Bhd. & 2 Ors.* [1994] 2 CLJ 634 sued the first defendant for the balance of the purchase price of goods sold and delivered to the first defendant at the first defendant's request. The second and third defendants were sued as guarantors of the first defendant. The plaintiff obtained final judgment against the defendants for the sum of RM69,223.45 with interest and the first and third defendants appealed. The appeal was dismissed with costs. Factually speaking, the facts in *Mulpha Engineering Sdn Bhd v. Polycool Engineering & Trading Sdn. Bhd. & 2 Ors (supra)* were different from the facts of the present case. Here, there was no

request made to the plaintiff by the defendant and the request was made to Darikha Enterprise from Taman Pertanian Malaysia and not to the plaintiff as claimed.

[24] The plaintiff also relied on the case of *Eckhardt Marine GMBH v. Sheriff, High Court of Malaya, Seremban & Ors* [2001] 3 CLJ 864, a decision of the Court of Appeal. With respect, that was a case of an open contract and it was in the form of an invitation to treat where someone has to turn up and make an offer. Here, in the present case at hand, the intention to create a contract was only intended for Darikha Enterprise initiated by a telephone conversation made by Rosli (DW1) and from the minutes of the meeting in exh. "D12" and the letter dated 25 March 1995 in exh. "D11", Darikha Enterprise was appointed to be the supplier of the said programme. To put it bluntly, the defendant had identified the supplier to carry out the contract and there was no invitation to treat as such. The supplier was none other than Darikha Enterprise.

[25] *Team 108 Technical Services v. Hujong Enterprises (Pte.) Ltd.* [1987] 1 MLJ 272 was a case where the quotations, the invoices and the payment vouchers made it clear that the contract for the supply and installation of the sound and lighting equipment was between the defendants and the plaintiffs. Here, the facts were entirely different. The offer was extended to Darikha Enterprise and it was later put into writing.

[26] Factually speaking, the facts in *Gibson v. Manchester City Council* [1978] 2 All ER 583, CA were entirely different from the present case at hand. There, it was a test case affecting some 350 tenants of council houses in the City of Manchester. There was in existence some form of open invitation to tenants of council houses to buy their houses and Gibson was one of them. Here, the defendant refuted the plaintiff's assertions that the invoice ("P2") and the delivery order ("P3") constituted a contract between the plaintiff and the defendant. According to the defendant, the delivery order only showed that there was some form of delivery but per se it did not constitute a binding contract.

[27] The defendant categorically denied that the plaintiff was given a short notice of the said programme. According to the defendant there was no notice given to the plaintiff at all because the latter was not a contracting party. Since the preparation of

the said programme was done in a rush, notice was only given to Darikha Enterprise and not by way of an open tender. Zanudin (DW2) had testified that local orders would only be issued later.

[28] The existence of the relevant documents from Darikha Enterprise cannot be disputed. The makers of those documents cannot be traced. Both Inspector Looi Ah Meng (DW3) and Encik Zulkafli Alias (DW4) testified that attempts had been carried out to trace the makers of those documents but to no avail. Zanudin (DW2) had testified and he categorically identified his signatures that appeared in the documents marked as exhibits "D15", "D16" and "D17". For convenience, I must now reproduce these documents ("D15" dated 29 March 1995 bearing number 0072, "D16" dated 29.3.95 bearing number 0076 and "D17" dated 29 March 1995 bearing number 0077). I will now reproduce exh. "D15":

DARIKHA ENTERPRISE

Lot 2.14, Campbell Complex, Jalan Dang Wangi, 50100
Kuala Lumpur
Tel: 2926782/2927730 Fax: 03-2927730

Invoice
Delivery Order

M/s Persatuan Mendayung Malaysia (Perdana)
259, Jalan Tun Razak
50400 Kuala Lumpur

No. 0072

Terms: ...
Date: 29/3/5

Item	Quantity	Particulars	Code	Unit Price	Amount (RM)
Menyediakan khemah untuk kursus Cinta Alam dan Majlis Pelancaran Rakan Rekreasi Cinta Alam mulai 29/3/95 hingga 1/4/95 (selama 4 hari) 144 orang x 4 hari x 10.00					RM5,760
				Total	

A Goods Sold Are Not Returnable/Deposit For Goods Not Collected Within 14 Days Shall Be Forfeited

Disahkan Betul

B

t.t.	t.t.
Received By:	Issued By:
Zanudin bin Abd Aziz	Darikha Enterprise
Timbalan Pengurus	Lot 2.14, Campbell Complex
Unit Taman Pertanian Malaysia	50100, Kuala Lumpur
Kementerian Pertanian	Tel: 2926782/2927730

C

Next, it would be exh. "D16":

D

DARIKHA ENTERPRISE

Lot 2.14, Campbell Complex, Jalan Dang Wangi, 50100 Kuala Lumpur

Tel: 2926782/2927730 Fax: 03-2927730

Invoice
Delivery Order

E

M/s Persatuan Rekreasi Nasional Malaysia
259, Jalan Tun Razak
50400 Kuala Lumpur

No. 0076

Terms ...
Date: 29/3/95

F

Item	Quantity	Particulars	Code	Unit Price	Amount (RM)
Membekalkan makanan dan minuman (Pack Ration) Kursus G Cinta Alam dan Majlis Pelancaran Rakan Rekreasi Cinta Alam mulai 29/3/95 hingga 1/4/95 (selama 4 hari) H **Pakej Menu** Beras Kari Ayam/Kari Daging/Sardin/ Biskut/Serikaya/Kopi/Teh/Gula/ Kacang Peas/Air Mineral/Tunku Zing/ I Lilin Bahanapi/Mastin (Sewa) 5000 orang x 4 hari x RM10.00 =					RM200,000
				Total	

Disahkan Betul

t.t.
Received By:
Zanudin bin Abd Aziz
Timbalan Pengurus
Unit Taman Pertanian Malaysia
Kementerian Pertanian

t.t.
Issued By:
Darikha Enterprise
Lot 2.14, Campbell Complex
50100, Kuala Lumpur
Tel: 2926782/2927730

This would be followed by exh. "D17":

DARIKHA ENTERPRISE

Lot 2.14, Campbell Complex, Jalan Dang Wangi, 50100
Kuala Lumpur
Tel: 2926782/2927730 Fax: 03-2927730

Invoice
Delivery Order

M/S Persatuan Mendayung Malaysia (Perdana)
259, Jalan Tun Razak
50400 Kuala Lumpur

No. 0077

Terms: ...
Date: 29/3/5

Item	Quantity	Particulars	Code	Unit Price	Amount (RM)
		Membekalkan makanan dan minuman (Pack Ration) Kursus Cinta Alam dan Majlis Pelancaran Rakan Muda Rekreasi Cinta Alam mulai 29/3/95 hingga 1/4/95 (selama 4 hari) **Pakej Menu** Beras Kari Ayam/Kari Daging/Sardin/ Biskut/Serikaya/Kopi/Teh/Gula/ Kacang Peas/Air Mineral/Tunku Zing/ Lilin Bahanapi/Mastin (Sewa) 200 orang x 4 hari x RM10.00 =		RM8,000
			Total		

A Goods Sold Are Not Returnable/Deposit For Goods Not Collected Within 14 Days Shall Be Forfeited

Disahkan Betul

B

t.t.	t.t.
Received By:	Issued By:
Zanudin bin Abd Aziz	Darikha Enterprise
Timbalan Pengurus	Lot 2.14, Campbell Complex
Unit Taman Pertanian Malaysia	50100, Kuala Lumpur
Kementerian Pertanian	Tel: 2926782/2927730

C

All these documents – referring to exhs. "D15, "D16" and "D17", were certainly self explanatory. Section 70 of the Evidence Act 1950 enacts as follows:

D **70. Admission of execution by party to attested document**

The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it is a document required by law to be attested."

E It simply means that if a person admits to the execution by himself of an attested document, the law says that it shall be sufficient proof of its execution as against that person. In short, it says that an attesting witness is not necessary when a party executing a document admits the fact of its execution (*Abbot v. Plumbe* [1779] F 1 Doug 216; *Johnson v. Mason* [1764] 1 Esp 89; *Doe v. Penfold* 8C & P 536; *Bringloe v. Goodson* [1839] 8 LJCP 364; *Call v. Dunning* [1803] 4 East 53; *Bowler v. Langworthy* [1793] 5 TR 366; and *Arunasalam v. Letchumi (f)* [1956] MLJ 89, HC). Zanudin (DW2) signed the documents marked as exhs. "D15", "D16", and G "D17" and he identified his signatures on those documents accordingly. That would constitute compliance with s. 70 of the Evidence Act 1950 (*Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1995] 4 CLJ 45).

H **The Second Issue**

[29] From the available evidence, it can be surmised that Darikha Enterprise was appointed to be the supplier of the goods for the said programme. In *Gibson v. Manchester City Council (supra)*, Lord Denning MR gave this pertinent advice as seen at p. 586 of the I report:

> You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material. If by their correspondence and their conduct you can see an agreement on all material terms, which was intended thenceforward to be binding, then there is a binding contract in law even though all the formalities have not been gone through.

And applying the advice of Lord Denning MR in *Gibson*, the defendant's conduct may be stated in this way:

(a) The telephone call made by Rosli (DW1) to Darikha Enterprise after getting the number from the newspaper. Darikha Enterprise made an invitation to treat and the defendant through Taman Pertanian Malaysia made an offer to Darikha Enterprise to supply goods for the said programme. For an offer to be capable of being converted into an agreement by way of an acceptance, it must consist of a definite promise to be bound provided that certain specified terms are accepted. Counsel in *Timothy v. Simpson* [1834] 6 C & P 499 at 500 suggested that: "If a man advertises goods at a certain price, I have a right to go into his shop and demand the article at the price marked", but Parke B retorted by way of a reply: "No; if you do, he has a right to turn you out." A classic example of an invitation to treat would be the case of *Fisher v. Bell* [1961] 1 QB 394 at 399, [1960] 3 All ER 731 at 733 where Lord Parker had this to say: "It is clear that, according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract."

(b) The representatives from Darikha Enterprise in the persons of Nizam (PW1) and Rahman turned up on the very next day and they discussed with Rosli (DW1) and Zanudin (DW2) regarding the sample of the goods to be supplied.

(c) From the minutes of the meeting as seen in exh. "D12", it showed that Darikha Enterprise was awarded the contract.

(d) The existence of the letter dated 25 March 1995 in exh. "D11" and the letter dated 28 March 1995 in exh. "D13" showed that Darikha Enterprise was the supplier to the said programme.

(e) The goods were received on 28 March 1995 from Nizam (PW1) the representative of Darikha Enterprise.

(f) The invoices and delivery orders in exhs. "D15", "D16" and "D17" from Darikha Enterprise regarding the goods that were supplied.

(g) Payments that were made to Darikha Enterprise.

It can readily be concluded that from the facts as itemised above, that the plaintiff was never appointed to be the supplier of goods and there was no contract entered between the plaintiff and the defendant. The available evidence pointed conclusively to the existence of the contract between the plaintiff and the defendant. I must vigorously apply and I did apply the doctrine of privity in favour of the defendant. A person who is not a party to a contract cannot take advantage of the provision of the contract. No one should be bound by the terms of a contract to which he is not a party to it *(Price v. Easton (supra))*. And a non-party, like the present plaintiff at hand, cannot bring an action on the contract. The plaintiff here was a stranger to the contract between the defendant and Darikha Enterprise. This was my judgment and I so hold accordingly.

[30] The plaintiff argued that the letter marked as exh. "D11" was highly questionable because the date found therein to be 25 March 1995 was handwritten and not typewritten. This was certainly a very lame argument because there is no law to say that a letter bearing a handwritten date cannot be accepted by this court.

The Third Issue

[31] Since there was no contract in existence between the plaintiff and the defendant, the defendant therefore did not owe the plaintiff the sum prayed for. The defendant had fulfilled its obligation under the contract and had made the necessary payment to Darikha Enterprise, the rightful contractual party in this case. This court would not put an end to the "whole fabric of our commercial life" (*Foo Tock Lin v. Piong Kew* [1963] 29 MLJ 67) but would certainly encourage it to grow by giving effect to the contract entered between the defendant and Darikha Enterprise.

Conclusion

[32] On the balance of probabilities, the plaintiff had failed to prove that there was a binding contract between the plaintiff and the defendant. Consequently, the plaintiff also failed to prove that the defendant owed the plaintiff the amount claimed. For the reasons as adumbrated above, I dismissed the plaintiff's claim with costs.